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Nos. 16-1436, 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF OF AMERICAN LEGISLATORS IN SUPPORT OF JUDICIAL RESTRAINT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents four questions concerning Executive Order No. 13780, *Protecting the Nation from Foreign Entry into the United States*, issued by the President on March 6, 2017: (1) Whether respondents' challenge to the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13780 is justiciable; (2) whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause; (3) whether the global injunction, which rests on alleged injury to a single individual plaintiff, is impermissibly overbroad; and (4) whether the challenges to Section 2(c) became moot on June 14, 2017.

This Amici Curiae brief addresses the following question: Whether Section 2(c) of the President's Executive Order violates the Establishment Clause?

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amici Curiae*, American Legislators in Support of Judicial Restraint, respectfully submit this brief.[1] *Amici Curiae*, all elected legislators, include:

- State Senator Patrick Colbeck (http://www.senatorpatrickcolbeck.com/)

-State Senator Mike Green (http://www.statesenatormikegreen.com/)

-State Senator Judy Emmons (http://www.senatorjudyemmons.com/)

-State Senator Tonya Schuitmaker (http://www.senatortonyaschuitmaker.com/)

-State Representative Tom Barrett (http://gophouse.org/representatives/central/barret/)

-United States Representative Tim Walberg (https://walberg.house.gov/).

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[1] Petitioner granted blanket consent for the filing of *amicus curiae* in this matter. *Amici Curiae* sought consent from Respondents, and received consent from the Respondents' counsel of record. Pursuant to Rule 37(a), *amici* provided 10-days' notice of its intent to file this amicus curiae brief to all counsel. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *amici curiae* brief.

Amici Curiae American Legislators in Support of Judicial Restraint, composed of elected state and federal legislators, are politically accountable to the citizenry for the public policy they promulgate. They care deeply about the policies affecting their constituents, and therefore, about the social and legal impact of judicial decisions that improperly usurp the legislative prerogative. They understand the proper scope of the Article III judicial power and the proper role of the federal judiciary in our constitutional republic. They hold special knowledge helpful to this Court about the importance of properly applying Constitutional provisions, like the Establishment Clause, that limit the exercise of governmental power.

Amici Curiae urge this Court, in resolving the issue before it, to look to the plain meaning of the words in the Establishment Clause. *Amici* additionally urge this Court to reverse *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* and its progeny extra-constitutionally permit changeable political preferences of unelected judges to substitute their politically unaccountable will for politically accountable governance. *Amici Curiae* file this brief to support the arguments of the Petitioner and encourage this Honorable Court to guide the American judiciary, and other branches of government, back to a sound constitutional basis for state-church relations.

BACKGROUND

On March 6, 2017, the President of the United States issued Executive Order No. 13780, *"Protecting the Nation from Foreign Entry into the United States,"* 82 Fed. Reg. 13209 (hereinafter EO). Section 14 of the EO set the EO's effective date as March 16, 2017. *Id.*

In Section 1(e) of the EO, the President identified conditions in six nations demonstrating that individuals from those nations continued to present heightened risks to the security of the United States. *Id.* Section 1(h) of the EO further indicated that some individuals entering the United States via our immigration system posed a threat to our national security. *Id.*

Section 2 of the EO required the Secretary of Homeland Security to determine whether foreign governments provide adequate information about individuals applying for U.S. visas. This section also directs the Secretary to report his findings to the President within twenty days of the effective date of the EO. *Id.*

To ensure dangerous nationals cannot enter the U.S. while the Executive Branch established "adequate standards . . . to prevent infiltration by foreign terrorists," Section 2(c) of the EO suspended entry by individuals from the six nations into the U.S. for 90 days from the effective date of the E.O. *Id.*[2] Those

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[2] Section 6 of the EO suspended "decisions on applications for refugee status" as well as "travel of refugees into the United States" under the United States Refugee Admission Program for 120 days from the effective date of the EO. The EO directed that

challenging the President's EO contend, *inter alia*, that Section 2(c) violates the Establishment Clause because the President's purpose in issuing the EO was not secular.

SUMMARY OF THE ARGUMENT

The President's Executive Order, banning travel from nations posing a threat to our national security, does not violate the Establishment Clause. This Court should apply the plain meaning of the words in the Establishment Clause to its judicial review of the President's Executive Order (EO). The Establishment Clause simply bans federal laws "respecting an establishment of religion." U.S. const. amend. I. The EO does not subject the American citizenry to governance under a theocracy. It does not coerce the American citizenry, by force of law and penalty, to practice an official religion. It does not, therefore, violate the Establishment Clause.

Amici additionally urge this Court to reverse *Lemon v. Kurtzman* because it unconstitutionally empowers unelected judges to supplant our politically accountable system of governance with their own protean preferences. *Lemon's* judicially contrived "secular

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the Secretary of State use this time to review the sufficiency of admission procedures and implement any further procedures needed "to ensure that individuals seeking admission as refugees do not pose a threat" to the security of the United States. *See* Exec. Order § 6(b)(i-iii). Section 6 of the EO also determined that entry of more than 50,000 refugees into the United States in Fiscal Year 2017 would be detrimental to the interest of the United States, and therefore suspended entries into the U.S. exceeding 50,000.

purpose" policy: 1) exceeds the scope of judicial power stated in Article III of the Constitution; 2) bypasses Constitutionally required, politically accountable processes for amending a Constitutional Rule of Law; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous U.S. citizens.

ARGUMENT

I. THE PRESIDENT'S EXECUTIVE ORDER BANNING TRAVEL FROM NATIONS POSING A THREAT TO OUR NATIONAL SECURITY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. const. amend. I.

A. The Court Should Apply the Plain Meaning of the Words in the Establishment Clause to the President's Executive Order.

The Constitution is not just a set of guidelines. It is the framework on which the government and our legal system are constructed. Its words both create this Court's authority and give it definition. Faithful adherence to those words is thus the touchstone for measuring the fulfillment of this Court's sacred duty. Every Justice who takes the oath of office in the nation's highest Court swears to uphold the Constitution as it is written, not as he or she would like it to be written. Discerning and applying the meaning

that the Drafters embodied in the Constitution's language is this Court's high calling.

Resolution of the issue before this Court necessarily requires a correct understanding of what the Establishment Clause means. To correctly apply the Rule of Law in the Establishment Clause, the appropriate approach is to ask what do the words in that Clause mean? This Court has long sought to honor this duty by understanding those meanings in their historical context. As Chief Justice Burger observed in *Marsh v. Chambers*, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied...." 463 U.S. 783, 790 (1983).

Reviewing the history of the Clause and its application, this Court held that a chaplain (employed by the government) did not violate the Establishment Clause by leading a legislature in prayer. *Id.* Similarly, in *Lee v. Weisman*, 505 U.S. 577, 631 (1992), Justice Scalia, joined by three other justices, stated that in this search for truth, "the meaning of the Clause is to be determined by reference to historical practices and understandings."

Webster's 1828 American Dictionary of the English Language defined *respecting* as: "[r]egarding; having regard to; relating to,"[3] and *Establishment* as "[t]he act

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[3] (http://webstersdictionary1828.com/Dictionary/respecting, *last visited* July 27, 2017).

of establishing, founding, ratifying or ordaining."[4] Thus, the simple meaning of the Establishment Clause is that government should not shackle the consciences of the people, for whose sake it exists, through a state religion.

The experience of our Founders, which the Establishment Clause reflects and seeks to save us from, was aptly delineated by Justice Scalia, dissenting in *Lee v. Weisman,* 505 U.S. 577, 640-41 (1992):

> The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.* Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

(internal citations omitted).

Numerous government policies supporting, acknowledging, and accommodating religion are considered time-honored practices that are a part of

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[4] (http://webstersdictionary1828.com/Dictionary/establishment, *last visited* July 27, 2017).

our nation's heritage. *See e.g.*, *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (Justice Kennedy, joined by Justices Rehnquist, Scalia, and White, dissenting). Properly understood, the "separation of church and state is not a limitation on churches or religion; it is a limit on the role of government with respect to churches and religious life in general." *See* M. W. McConnell, *Religion and its Relation to Limited Government,* 34 Harvard J. of Law and Pub. Pol. 943, 944 (2010).

The President's National Security EO does not violate the Establishment Clause because it was not an action regarding or relating to the act of establishing or founding of a religion. The Order does not subject the American citizenry to governance under a theocracy. Nor does it coerce the American citizenry, by force of law and penalty, to practice one official religion to the exclusion of all others. The President's action did not, therefore, violate the Establishment Clause.

B. The Court Should Abandon the *Lemon* Test.

This Court's "religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." *Weisman,* 505 U.S. at 644 (Scalia, J., joined by three other Justices, dissenting). The test, not yet overruled by this Court, regularly continues to receive "well-earned criticism." *Id.* at 644.

In *Lemon*, the Court replaced the test proscribed by the Constitution—whether government action "established" a religion, with a test of its own creation,

whether government action had a secular purpose or "endorsed" religion. 403 U.S. at 612-13. The Court judicially contrived a three-part test, and then mandated that government action must satisfy all three elements to comport with the Establishment Clause:

> First, the [government action] must have a secular [] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [government action] must not foster an excessive government entanglement with religion.

Id.

A few justices addressed the second prong of the *Lemon* test by requiring the government action to not even symbolically endorse religion. No agreement existed though, even among those justices, on how to decide when a government action symbolically endorsed religion.[5]

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[5] For example, Justice O'Connor, concurring in *Wallace v. Jaffree* stated:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. *** The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].

472 U.S. 38, 76 (1985).

Elsewhere she likewise stated that: "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 773 (1995) (O'connor, J. concurring). Compare Justice O'Connor's measure with that of Justice Souter, who

The *Lemon* Court, in fashioning its test, ignored the plain meaning of the words in the Clause. When the Drafters wrote the Establishment Clause, they well knew the meanings of both "establish" and "endorse." They chose "establish" to express their intent. If they had meant "endorse," there is no doubt they would have chosen that word. It was wrong for the *Lemon* Court to alter the meaning of the Establishment Clause, and this Court should correct that error.

Remarkably, when determining the constitutionality of a government action under *Lemon,* the content of the government action is irrelevant. Instead, the *Lemon* test requires that a judge make a subjective assessment as to whether the government actor had a secular purpose (*i.e.*, the judge must attempt to personally divine the heart and mind of the President, legislator, county commissioner, etc., and then subjectively conclude whether the government actor had a secular purpose). If no, the judge must hold

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opined that he "attribute[s] these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis..., where I believe that such reasonable perceptions matter." *Id.* at 786. Likewise, Justice Stevens articulated a less informed "reasonable person" standard to determine whether an endorsement of religion exists when addressing the second prong in *Lemon*:

> If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.

Id. at 799.

that the government action violates the Establishment Clause.

Amici Curiae urge this Court to reverse *Lemon v. Kurtzman* because it extra-Constitutionally permits changeable political preferences of unelected judges to substitute their politically unaccountable will for politically accountable governance guaranteed by the Constitution. As explained below, *Lemon's* "secular purpose" policy: 1) exceeds the scope of judicial power granted in Article III of the Constitution; 2) bypasses constitutionally required processes for amending the Constitution; 3) undermines the legitimacy of the judiciary; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous United States citizens.

Lemon's "secular purpose" test exceeded the scope of judicial power stated in Article III of the Constitution. In pertinent part, Article III of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... (Section 1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

U.S. Const. art. III, § 2.

The *Lemon* Court conspicuously failed to identify any legitimate source of constitutional authority on which it relied when amending the meaning of the Establishment Clause. The simple reason the *Lemon* Court failed to do so is that no enumerated judicial power exists for the judiciary to amend the constitutional law of the nation.

> The Federal Government "is acknowledged by all, to be one of enumerated powers." That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . .
>
> The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404, 405 (1819); Const. art. I § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 Wheat. 1, 194-95, 6 L.Ed. 23 (1824)).

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. 137 (1803).

The *Lemon* Court, wandering far beyond the scope of its Article III powers, improperly permits changeable political preferences of unelected judges to amend a Constitutional Rule of Law (i.e., the Establishment Clause). Thus, *Lemon* amends "make no law respecting an establishment of religion" to instead require that "every government action must have a secular purpose" merely because a panel of Justices preferred it so.

Moreover, in amending the meaning of the words in the Establishment Clause, *Lemon* bypassed constitutionally required political processes that specifically require involvement of politically-accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .

U.S. Const. art. V.

Although the judicial branch may hold the power to say what the provisions of the Constitution mean, that power does not extend to amending or evolving the meaning of these provisions. That power is delegated to the politically accountable branches of government in Article V. Thus, when *Lemon* amended the meaning of the Establishment Clause, it usurped legislative authority in violation of Article V.

When a court steps beyond its limited duty and usurps legislative authority, as the Court did in *Lemon*, it undermines good governance under the Rule of Law and its own legitimacy. To test the provisions of a government action against the Constitution is one thing; judicially imposing a new meaning on the words of the Constitution to achieve a judicially preferred outcome or social policy is another.

Those supporting *Lemon* wrongly see the Constitution as an evolving organism, the meaning of which they believe their jurisprudence empowers them to actively manipulate. They become Platonic Philosopher Kings, ruling by judicial fiat, unbound by the constraints of the Constitution's actual language. *Lemon* embeds this tyrannical principle in our Constitutional jurisprudence by allowing judges to make subjective, ad hoc assessments as to whether a government actor had a secular purpose or motive.

In this case, the courts below struck down the President's action because it violated *Lemon's* distorted version of the Establishment Clause. The lower courts subjectively applied *Lemon's* judge-made doctrine that all government actions must have a secular purpose. *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir 2017). In applying this judicially

contrived test, the court ignored the content of the EO, and relied instead on religious references in Donald Trump's pre-election campaign speeches to hold that the EO violated the Establishment Clause. *Id.*[6] This case shows once again that *Lemon's* subjective test makes a litigant's success in judge-shopping the best indicator of whether a law will be struck down under the Establishment Clause.

If *Lemon's* judicially manufactured doctrine existed during the Lincoln Administration, the Emancipation Proclamation would be unconstitutional because Lincoln expressly invoked "the gracious favor of Almighty God." – not in a political speech during a Presidential campaign, but in the text of the proclamation itself.[7] Thus, when Judge Paul Niemeyer asked an ACLU lawyer in this case whether it would be Constitutional if Presidential candidate Hillary Clinton had drafted the exact same Executive Order, the lawyer reluctantly, but truthfully, answered in the affirmative—revealing the absurdity of the doctrine

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[6] Contrary to the lower court's unsupported suppositions, the President's EO, issued after he was elected, survives even if it must face the judicially-manufactured *Lemon* test. This is because, *inter alia*, the President's purpose in issuing it was purely a secular one – preserving national security. *See*, Executive Order 13780, *Protecting the Nation from Foreign Entry into the United States*, 82 Fed. Reg. 13209.

[7] *Available at* (https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html, *last visited* August 2, 2017).

and the potential for its abuse by a politically motivated judge or activist lawyer.[8]

Additionally, the *Lemon* test undermines predictability in the law, a vital component of good governance under the Rule of Law. When it comes to judicial review of government action and the Establishment Clause, the subjectivist nature of the *Lemon* test produces inconsistent judicial precedents. This inconsistency is inevitable because judges utilizing *Lemon* make a personal subjective assessment as to whether a government actor had a secular purpose, rather than looking to the content of the government action itself.

Inconsistent judicial precedents lead to unpredictability in the law. The inconsistent precedents produced by *Lemon's* subjectivist jurisprudence provide no useful guidance for government officials trying to act Constitutionally. To illustrate, compare two Establishment Clause cases handed down by this Court on the same day: *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding government action placing Ten Commandments on Government property as Constitutional) and *McCreary County v. ACLU*, 545 U.S. 844 (2005) (striking down government action placing Ten Commandments on government property as unconstitutional). Four justices would have upheld both. Four justices would

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[8] IRAP, 857 F.3d 554 (4th Cir 2017) (Oral Argument, as reported in the American Thinker, *available at* (http://www.americanthinker.com/blog/2017/05/aclu_lawyer_admits_trump_travel_ban_would_be_constitutional_if_hillary_issued_it.html#ixzz4o56hdFvM, *last visited* August 15, 2017)).

have struck down both. One justice upheld one and struck down the other—but applying *Lemon's* subjective standard, found one symbolically endorsed religion and the other did not. (also compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding baby Jesus in a manger constitutional) and *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (striking down baby Jesus in a manger as unconstitutional)).

If *Lemon* says the Ten Commandments are both Constitutional and unconstitutional; if *Lemon* says displaying baby Jesus in a manger is both Constitutional and unconstitutional; if *Lemon* says Hillary Clinton issuing an EO is Constitutional but President Trump issuing the same EO is not, then no predictability exists for those seeking to conform their conduct to the law. Predictability in the law is a necessary component of good governance under the Rule of Law. *Lemon* replaces predictability in the law with the evolving political preferences of unelected judges.

Finally, *Lemon's* judicially contrived "secular purpose" test creates unjustifiable hostility toward the religious identity of numerous United States citizens. Many United States citizens seek guidance from their faith in formulating their public policy positions. Activist lawyers and politically motivated judges repeatedly use the *Lemon* doctrine to deprive and diminish a person's religious identity. They do so by requiring religious people to substitute a purpose informed by their religious conscience for one founded on secular beliefs or traditions.

Requiring that every government action have a secular purpose and not even symbolically endorse

religion is not only hostile toward a person's religious identity, it is an attempt to make that identity culturally, socially, and politically irrelevant. Proponents of this secular approach favor it because it enables judges to nullify unalienable rights. They assert that everyone can participate in important policy discussions except those whose identity is informed by religious viewpoints. Thus, the Court has struck down, for example, laws accommodating the teaching of creation science and regulating the teaching of evolution.

For example, in the State of Louisiana, Darwin's theory of evolution was taught in the government schools. Louisiana passed a law to also accommodate those with a different theory on the origin of the universe— creation science.[9] On its face, such an effort seems to embody the very essence of neutrality. The Court, however, reached an opposite conclusion in *Edwards v. Aguillard,* holding the law unconstitutional because it lacked a secular purpose and symbolically endorsed religious ideas. 482 U.S. 578 at 583, 592 (1987). According to *Lemon's* revisionist test, to be constitutionally "neutral," all laws and other government action must have a secular purpose and not even symbolically endorse religion.[10]

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[9] The law prohibited the teaching of the theory of evolution in public schools unless accompanied by the instruction in creation science.

[10] For a scholarly discussion of how the neutrality principles demean religion in the United States, *see* G. Moens, "The Menace of Neutrality in Religion" (2004) (Summer) *Brigham Young U. L. Rev* 535, 566–572.

Similarly, in *Epperson v. Arkansas*, the State of Arkansas passed a law regulating the teaching of evolution. 393 U.S. 97 (1968). The Court began its analysis by declaring that "[g]overnment in our democracy ... must be neutral ..." *Id.* at 103. The Court nevertheless proceeded to hold that because the law was motivated by a religious purpose, it violated the Establishment Clause.

Thus, although often couching its analysis in terms of neutrality, court decisions utilizing *Lemon* require secularly informed purposes while prohibiting religiously informed ones. Descriptive of such an analysis is Justice O'Connor's concurring opinion in *Wallace v. Jaffree*:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws ... It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

472 U.S. 38 (1985).

It is apparently acceptable, and sufficiently neutral though, for government to dictate and endorse a secular belief or practice that all citizens do not share.

The implications of decisions like *Aguillard* and *Epperson* are immense. Mandating the irrelevance of religious identity and God facilitates judicial extinction of unalienable liberty as viewed by the Framers.

Increasing numbers of judges and other government authorities rely on *Lemon* to diminish religious identity

and conscience. By way of example, senior citizens at a nursing home in Georgia were prohibited from praying before they ate their meal. The government said that because the meals were subsidized by the government, praying over the meal would be a violation of the Establishment Clause. *Georgia Seniors Told They Can't Pray Before Meals*, ASSOCIATED PRESS, (May 10, 2010). Likewise, those whose actions are informed by the sacred rather than the secular have faced Establishment Clause challenges for erecting the Ten Commandments, *McCreary County v. ACLU,* 545 U.S. 844 (2005), raising memorials for the fallen, *Am. Atheists, Inc v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), engaging in a moment of silence prior to starting school, *Wallace v. Jaffree,* 472 U.S. 38 (1985), praying prior to football games, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and for displaying a manger scene at Christmas time. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

Several Justices on this Court have recognized how, contrary to the plain meaning of the Clause, *Lemon's* judicially contrived "secular purpose" test creates unjustifiable hostility toward the religious identity of numerous United States citizens:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage .... Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society [citation omitted]. Any approach less

> sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious ....
>
> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.
>
> * * *
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Allegheny, supra, at 657-659 (Justice Kennedy, joined by Justices Rehnquist, Scalia, and White dissenting). These Justices, dissenting in *Allegheny* correctly recognized that *Lemon's* "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents..." *Id.* at 655.

For some legislators viewing the world through their religious identity, God and his Word are real, and

therefore really matter. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

They understandably, therefore, oppose devolutionary social engineering that threatens the health, safety, and morals of the nation, as viewed through their religious identity. The government *Lemon* envisions must shape public policy informed by secular dogma, without regard to any religious conscience or moral considerations. In such a government, wisdom derived from religious tradition or individual conscience informed thereby has no place. Legislators should not have to choose between fidelity to their religious identity or participating in the policymaking process. The *Lemon* test demands that they do, invalidating any policy they make that happens to be informed by their religious identity.

Moreover, the *Lemon* test deprives people of faith of their dignity by discouraging them from participating in government, by telling citizens that reliance on their faith while serving in government is unconstitutional.

Prohibiting a policy simply because it is informed by ancient sacred tenets prevents thousands of years of wisdom from informing the public ethic. The idea that God created humans in His image, and that all human life has dignity, ended slavery and advanced the rights of women around the world. Conversely, when government suppresses religious identity and the free expression of religious ideals, it often results in tragic consequences. Stalin murdered over 42 million. Mao Zedong murdered over 37 million. Hitler murdered over 20 million. And the list of atrocities goes on and on where those in power selectively pick and choose which citizen's identities it will arbitrarily censure.

We are, therefore, in the midst of a high-stakes battle over the character of the American nation. The extent to which *Lemon's* "secular purpose" jurisprudence prevails over the view that the plain meaning of a Constitutional provision governs will determine: 1) whether unalienable truth, as envisioned in the Declaration, will continue to be relevant as an objective limit on government action; and 2) whether the judiciary replaces the Framers' intent with its own personal social policy views.

Institutional integrity cannot exist without personal virtue. Good governance and civic institutional integrity rest on the virtue of those holding power within those institutions. Ideas grounded in one's religious identity support and nurture this virtue and should, therefore, always be permitted within the marketplace of ideas and the policymaking process. The *Lemon* test precludes great ideas grounded in one's religious identity from entering the policymaking process. People of faith should not be stripped of their dignity, religious identity, and conscience in order to serve in our constitutional republic.

In summary, judicial crafting of a subjective three-prong "secular purpose" test defining the Establishment Clause: 1) exceeds the scope of Article III; 2) bypasses constitutionally required politically accountable processes for amending a constitutional rule of law; 3) undercuts the legitimacy of the judicial power; 4) creates substantial unpredictability in the law; and 5) fosters unjustifiable hostility toward the religious identity and dignity of numerous U.S. citizens. This Court should, therefore, overrule *Lemon*

and no longer apply its "secular purpose" test to government action.

CONCLUSION

Because the President's EO was not a law establishing a national religion, the EO did not violate the Establishment Clause of the First Amendment. This Honorable Court should, therefore, reverse the decision of the appellate court.

Respectfully submitted,

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